HAZAMA CORPORATION

v.

KMS BUILDERS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[CIVIL SUIT NO: D1-22-595-2000]
30 DECEMBER 2003

CIVIL PROCEDURE: *Pleadings - Statement of claim - Claim for work done under sub-contract - Lifting of corporate veil - Whether required arduous examination of conflicting affidavits - Claim for restitution in absence of contract - Defendant acquiring no unjust enrichment - Whether fatal - Whether claim frivolous and vexatious - Rules of High Court 1980 O. 14, O. 18 r. 19(1) - Contracts Act 1950 s. 71*

CONTRACT: *Privity - Novation agreement - Subcontract work - Claim for work done - Whether there was privity of contract existing*

By a novation agreement dated 30 March 1998, the plaintiff agreed to carry out all the obligations of Satujaya Sdn Bhd, the first defendant's sub-contractor for a construction project in Kuala Lumpur. The first defendant was the second defendant's main contractor, whilst the second defendant was the third defendant's turnkey contractor for the project. Misunderstandings arose between the parties regarding payments payable to the plaintiff for work done on the project, whereupon the plaintiff sued the first defendant and sought several relief against the second and third defendants. The second and third defendants applied to strike out the claim under O. 18 r. 19(1) Rules of the High Court 1980 ('RHC'), but the application was dismissed by the learned Senior Assistant Registrar. In this appeal, the second and third defendants argued that the plaintiff's claim was unsustainable as there was no privity of contract between the plaintiff and themselves. It was further argued that the claim against the third defendant, premised as it were on s. 71 of the Contracts Act 1950, was likewise unsustainable, as there was no unjust enrichment secured or obtained by the third defendant.

Held (dismissing the second defendant's appeal; allowing the third defendant's appeal):

[1] At this very early stage of the proceedings, the question of whether or not the plaintiff's attempt in seeking to lift the second defendant's corporate veil is unsustainable could not be queried into, as it would

require an arduous and minute examination of the conflicting affidavit evidence adduced thus far. Such an undertaking would go against the very grain of the provisions of O. 18 r. 19(1) of the RHC. The second defendant's appeal, hence, was devoid of any merit. (pp 191 c-d)

[2] The plaintiff was suing the first defendant for works done under the sub-contract. At no time did the plaintiff carry out the work for the third defendant nor did they intend to deliver the fruits of their labour to the third defendant. Upon the first defendant's default to pay, it was not open for the plaintiff to seek reimbursement from the third defendant by claiming that the works were actually done for the benefit of the third defendant. (p 192 g)

[2a] The benefit enjoyed by the third defendant for the works completed on the project derived from the works delivered by the second defendant as the turnkey contractor. Not only the third defendant did not acquire any unjust enrichment at the expense of the plaintiff, they were also bound by contract to pay the second defendant for the entire work done on the project. As such, the plaintiff's claim against the third defendant was frivolous and vexatious and to allow same to proceed would be an abuse of process. (pp 192 h & 193 b)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd [2000] 2 CLJ 457 CA ***(refd)***

Aspatra Sdn Bhd v. Bank Bumiputra (M) Bhd [1988] 1 MLJ 97 ***(refd)***

Goh Hooi Yin v. Lim Teong Ghee & Ors [1977] 2 MLJ 26 ***(refd)***

Goh Soon Ann v. Sandvik Malaysia Sdn Bhd [1984] 1 CLJ 137 FC ***(refd)***

Pet Far Eastern (M) Sdn Bhd v. Jay Young Huat & Ors [1999] 2 CLJ 886 HC ***(refd)***

Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 71

Rules of the High Court 1980, O. 18 r. 19(1)

For respondent/plaintiff - Khoo Guan Huat (Ashok Kumar); M/s Skrine
For appellant/2nd defendant - M Sanjay; M/s Lee Hishammuddin
For appellant/3rd defendant - Wan Mohd Jam; M/s Prasad Abraham & Assocs

Reported by WA Sharif

JUDGMENT

Vincent Ng J:

Preamble

Before me are the second and third defendants' appeals, encls. 29 and 28 respectively, against the decision of the learned Senior Assistant Registrar dated 19 October 2001, dismissing their applications under O. 18 r. 19(1) of the Rules of the High Court 1980 to strike out the plaintiff's writ and amended statement of claim on the grounds that:

(i) it discloses no reasonable cause of action; or

(ii) it is scandalous, frivolous or vexatious; or

(iii) it is otherwise an abuse of the process of the court.

Background Facts

In order to ensure the fair determination of this appeal, it is necessary to first identify the parties to this proceedings.

The third defendant is the registered and beneficial owner of several pieces of land, all of which are situated in Section 57 Jalan Changkat Bukit Bintang - Tengkat Tong Shin, Kuala Lumpur (the land). *Vide* a contract dated 16 December 1996, the third defendant appointed the second defendant as the turnkey contractor for the purpose of constructing a multi-storey hotel on the said land (the project). The second defendant then appointed the first defendant as the main contractor for the said project on 17 March 1998. The first defendant in turn, appointed Satujaya Sdn Bhd as their domestic sub-contractor.

The plaintiff was brought into the picture by virtue of a novation agreement dated 30 March 1998 (exh. MYK4 encl. 12) executed by the first defendant, Satujaya Sdn Bhd and the plaintiff, whereby the plaintiff agreed to carry out all the obligations of Satujaya Sdn Bhd as sub-contractor for the said project.

The plaintiff was seeking the following reliefs against the second defendant:

(a) a declaration that:

(i) that the first and second defendants are and/were at all material times a single economic unit; and/or

(ii) that the first defendant is and/or was at all material times the agent of the second defendant; and/or

(iii) the first defendant is and/or was at all material times a facade of the second defendant;

(b) an order that the corporate veil of the first and second defendants be lifted;

(c) a declaration that the plaintiff is entitled to an extension of time until 22 November 1999 or such other date as may be fixed by the Court to complete the project;

(d) the sum of RM1,115,570.79 being one-half of the sum retained by the first and/or second defendants;

(e) the sum of RM3,328,909.02 under Certificates Nos: 17 & 18;

(f) the sum of RM6,639,378.56 or such sum or sums as may be assessed by the court being claims made by the plaintiff remaining unpaid for work done in respect of the project; and

(g) the sum of RM2,944,783.90 or such sum or sums as may be assessed by the court being costs for loss and expense, disruption and acceleration during the project.

As against the third defendant, the plaintiff was seeking the sum of RM14,028,642.27 or such sum or sums as may be assessed by the court being the value of works executed by the plaintiff in respect of the project.

In both the second and third defendants' striking out applications, they contended that there was no privity of contract between the plaintiff and themselves.

The Second Defendant's Appeal

The second defendant argued that the dispute giving rise to this suit was essentially between the plaintiff and the first defendant and related to monies outstanding for the construction works carried out by the plaintiff for the first defendant. The second defendant contended that until this dispute was resolved through arbitration proceedings, any claim against them was premature and without merit.

The second defendant maintained that the plaintiff's proposition for lifting their corporate veil seemed premised on the grounds that as first defendant was the second defendant's subsidiary, they shared common directors, employees and registered address. Although the second defendant did not deny all of this, they submitted that this proposition was flawed and misconceived. In light of trite principles of corporate law, they alleged that the plaintiff's claim against them was obviously unsustainable.

The court's attention was drawn to the judgment of Arulanandom J in *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1977] 2 MLJ 26 at 29 wherein His Lordship had opined that:

> A company is a complete legal entity and a completely different person from others or other companies, and directors cannot be equated with the company or *vice versa*.

(See *Aspatra Sdn Bhd v. Bank Bumiputra (M) Bhd* [1988] 1 MLJ 97.)

As robust as the second defendant's arguments were, I find that it would be folly to decide affirmatively in their favour for this simple reason. At this early stage of the proceedings, the question of whether or not the plaintiff's attempt in seeking to lift the second defendant's sacred corporate veil is unsustainable could not be queried as it would necessarily require an arduous and minute examination of the conflicting affidavit evidence adduced thus far. Such an undertaking would go against the very grain of the provisions of O. 18 r. 19(1) of the RHC 1980. The weeding out of claims that are plainly or evidently unsustainable in law under this specific order should be achieved without the protracted fact-finding and detailed scrutiny undertaken by a trial judge. (See *Pet Far Eastern (M) Sdn Bhd v. Jay Young Huat & Ors* [1999] 2 CLJ 886 and *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd* [2000] 2 CLJ 457.)

Conclusion

On the facts and circumstances of the present case, I find that this is not possible, thus rendering the second defendant's appeal devoid of any merit.

Accordingly, I dismiss encl. 29 with costs.

The Third Defendant's Appeal

There were only two references to the third defendant in the statement of claim (encl. 1); in para. 4 wherein the plaintiff identified and described the third defendant and in para. 27(2) and (3) wherein the plaintiff set out the reliefs they were seeking against the third defendant.

The plaintiff, on the other hand, maintained that their claim against the third defendant was premised on s. 71 of the Contracts Act 1950; which is reproduced here for ease of reference:

> Section 71 - Obligation of person enjoying benefit of non-gratuitous act.
>
> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

In *Siow Wong Fatt v. Susur Mining Rotan Ltd & Anor* [1967] 2 MLJ 118, Lord Upjohn, delivering the decision of the Privy Council, held that it was common ground that four conditions must be satisfied to establish a claim under (the then) s. 71 Contracts (Malay States) Ordinance 1950. He set out the four conditions as follows:

> The doing of the act or the delivery of the thing referred to in the section:
>
> (i) must be lawful; and
>
> (ii) **must be done for another person**: and
>
> (iii) must not be intended to be done gratuitously; and
>
> (iv) **must be such that the other person enjoys the benefit of the act or the delivery**. (emphasis added).

The question of the intention of the claimant may also assist in the court's determination as to whether condition (ii) above has been satisfied. In *Goh Soon Ann v. Sandvik Malaysia Sdn Bhd* [1984] 1 CLJ 137 the Federal Court applied the principles on section 71 that was firmly established in *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118. On the facts, it was held therein that since the plaintiff's intention at the time of the act was to deliver its goods to the salesman (a third party) and not to the defendant, the plaintiff had failed to establish a claim under s. 71 as it was plain that the condition which required that the act must be done by the plaintiff for the defendant had not been satisfied.

The pivotal question that needed to be addressed for the purposes of this appeal was whether the works completed on the said land by the plaintiff was done for the third defendant.

From the statement of claim, it was obvious that the plaintiff was suing the first defendant for works done under the sub-contract. At no time did the plaintiff carry out the works for the third defendant nor did they intend to deliver the fruits of their labour to the third defendant. Upon the first defendant's default to pay, it was not open to the plaintiff to seek reimbursement from the third defendant by claiming that the works were actually done for the benefit of the third defendant.

I hold that any benefit enjoyed by the third defendant for the works completed on the said land was neither derived nor a result of the plaintiff's act, but rather the works delivered by the second defendant as the turnkey contractor in return for a financial consideration of RM92.5 million. For this reason, clearly, the third defendant did not acquire any unjust enrichment at the expense of the plaintiff.

The true purpose of s. 71 of the Contracts Act 1950 is to enable a plaintiff to claim for restitution in the absence of a contract where otherwise the plaintiff would be without remedy to sue. The section seeks to prevent unjust enrichment.

In the present case, the third defendant gains no enrichment at the expense of the plaintiff. They are in fact bound by contract to pay the second defendant for the entire works done on the said land. The plaintiff's remedy, if any, is only against the first and second defendants.

Conclusion

After careful perusal of the cause papers and written submissions from both sides, I find that the answer to the question must be in the negative. As such, the plaintiff's claim against the third defendant is frivolous and vexatious and to allow the same to proceed any further would indeed be an abuse of the process of the court.

Accordingly, the third defendant's appeal is allowed with costs.